I have read this record with some care and have listened to Mr. Lim Kheng Kooi's arguments; but the learned President saw the witnesses and heard them give evidence and I can see nothing wrong in his Grounds of Decision. It appears to me that the accused's defence did not raise a doubt in his mind and, therefore, I think the conviction is right.

With regard to the sentence, it seems to me that the learned President has taken into consideration that there were other people concerned in this matter and I find it impossible to say that in an offence of cheating whereby 20 bundles of tin plates valued at about $2,000 disappeared the sentence imposed can be said to be manifestly excessive. For these reasons the appeal must be dismissed.

Appeal dismissed.

ISMAIL BIN HUSSIN v. PUBLIC PROSECUTOR.

[C. A. (Mathew, C.J., Wilson and Taylor, JJ.) January 24, 1953]

[K.L. — F.M. Criminal Appeal No. 106 of 1952]

Murder — Penal Code, s. 300 — Construction — Intention to cause death — Effect of challenge — Proof of identity of body.

The intention required to constitute murder is not necessarily an intention to kill an identified person. An actual intention to kill a human being, though formed on impulse and on suspicion that the person is a terrorist, is in law a murderous intention.

A challenge has no legal effect of its own; it is merely a fact which may be relevant to the state of mind of the accused.

It is the duty of the prosecution to prove strictly the identity of the body examined, post mortem.

Case referred to:—

(1) *Fazal Din v. Public Prosecutor* (1949) M.L.J. 123.

COURT OF APPEAL, CRIMINAL.

C. O. G. Gould for the appellant.

P. G. Clough (D.P.P.) for the respondent.

The facts appear sufficiently from the judgment.

Cur. Adv. Vult.

The judgment of the Court of Appeal was delivered by:—

Taylor, J.: — This appellant was convicted of the murder of one Omar and also of the attempted murder, in the same incident, of a man named Rifin.

The appellant, who is a member of the Home Guard at Kanjat in the Ulu Dungun district of Trengganu, went out about dawn intending to go to his padi land. He was accompanied by a friend. Both carried shot guns. They went along one of two paths near a river. When they had gone about half a mile the appellant waited in a patch of secondary jungle while his friend went to inspect a fish trap.

The deceased and Rifin went to the same patch of small jungle to shoot barking deer. Others went to the same area to shoot, but independently. The deceased was walking some four or five paces ahead of Rifin when suddenly a shot was fired killing Omar instantly; some of the pellets struck Rifin in the groin. A second shot wounded his thighs. Rifin then saw a man with a gun, moving in the blukar and fired two shots, without effect. Five or six more shots were fired from the blukar, also without effect. The firing was heard and the Penghulu, with a small party, went to the scene. Rifin told them that terrorists had fired at him. The Penghulu took the body and the wounded man to hospital.

On his return, the appellant surrendered and made a statement, the content of which was not proved. Two days later, the appellant made a confession to a magistrate in which he said that while he was waiting for his friend, he saw a figure and fired at once; that he then saw the legs only of another person and again fired; that two shots were then fired at him; that he then fired about eight times to warn the villagers and retreated across the river.

It is remarkable that the accused in his confession, and Rifin in his evidence at the trial some months later, detail the shots fired in exactly the same sequence.

There was some evidence, but not of a convincing character, of friction between the accused and the deceased several years earlier. Both were Home Guards and several of their comrades gave evidence, but there was no suggestion of any recent grievance. There was nothing to show that the accused knew that Omar was likely to go to the spot on that particular morning.

The case made at the trial was that the accused must have recognised Omar and that he shot him purposely, with malice.

The defence was that the accused did not recognise Omar and mistook him for a terrorist.

The accused went into the box and swore that he had challenged the deceased thrice in a loud voice, and received no reply. This was almost certainly untrue. It was quite inconsistent with his confession in which he said that he "fired at once at the moving figure." Had he been challenged, Omar would have stopped and almost certainly answered. The question of challenge was never put to Rifin.

In his summing up the learned trial Judge read the definition of culpable homicide, section 299 of the Penal Code, and then said that if the act was done with the intention of causing death, it would amount to murder. He held, rightly, that the other provisions of section 300 did not apply to these facts.

He then summed up the evidence regarding the circumstances of the shooting, with special attention to the visibility, and said :—

> ".....whether you are satisfied.....that the accused was in a position to see that it was Omar and to recognise him,"

and later

> "While you are considering this question whether an intention of murder.....has been established, you will have to give some consideration to this question of motive"

and again

> "whether you are satisfied that the accused saw that it was the deceased who was coming along that path and that he intentionally fired at him with the intent to kill."

Later he said

> "If you are not satisfied that the accused's version to the magistrate is untrue, you should consider whether the prosecution have established a prima facie case of culpable homicide not amounting to murder."

The only material difference between the confession and the other evidence at the trial was as to the challenge.

Subsequently the Judge said :—

> "If he properly gave the challenge because he suspected the persons in the vicinity to be communists and got no reply and then fired — well, the law is not going to ascribe to him any crime.
>
> If you believe his story on all material points — except that you do not believe he gave any challenge — then I suggest that you may find the facts fall within the definition of culpable homicide not amounting to murder."

In the end he left it to the assessors to acquit or to convict of murder, or of culpable homicide, or of causing death by a rash act.

The broad effect of this summing up was to leave to the assessors three issues.

> If they thought that the accused recognised Omar and purposely shot him, then it was murder.
>
> If they thought that he shot a suspected terrorist without challenge, then it was culpable homicide.
>
> If they thought he shot a suspected terrorist after his challenge was unanswered, then it was no offence.

These were not the correct issues. The first is correct up to a point but it is incomplete. It suggests that in order to constitute murder, the law requires an express intention to kill an identified person. This is too narrow. But in the peculiar circumstances, it served a purpose. By convicting of murder on that direction the assessors show that in their opinion the accused did recognise Omar. In so far as the direction was inadequate in point of law, it was unduly favourable to the accused. Too much importance was attached to the issue of challenge or no challenge. A challenge has no legal force of its own. It is merely a fact, which may have a bearing on the state of mind of the accused but does not affect the victim. Say a Chinese rubber tapper, who does not understand any Malay, is on his way to his work in the early dawn in an estate partly overgrown. Suddenly a person whom he cannot see shouts: "Siapa itu?" Why should he think the shout is addressed to him? Is he to be shot out of hand? Even if, six months earlier, a party of bandits had passed through that area, he might not know of it. In our anxiety to suppress terrorism, we must not deprive those who stick to their work in unsafe areas of such protection as the law is able to afford.

The evidence as a whole shows beyond doubt that the accused saw a man and shot him at close range. Obviously he intended to kill.

It may be that he did not recognise Omar. It is highly unlikely that he had any premeditated design to kill anyone or even to fire. But he knew that his friend was within a few yards and both he and Omar were on, or very near to, a not unfrequented path.

The most probable explanation is that the accused's first statement to the magistrate is wholly true — that he saw a man and fired at once — on impulse — without any conscious or reasoned thought. But however suddenly the intention was formed, the intention was to kill. That amounts to murder.

What the consequences should be is a question for separate consideration, by another authority and possibly with additional materials.

As regards the shooting of Rifin, it is not unusual to fire a shot gun at a man's legs, to prevent escape and the like, where there is a definite intention not to kill. The second conviction should therefore have been for causing grievous hurt and a sentence of three years would have sufficed.

One other point was taken on appeal. There was no direct evidence that the body examined by the medical officer at the post mortem was the body of Omar. It was suggested that this is a fatal defect in the prosecution case, as in *Fazal Din v. Public Prosecutor*[1]. The facts, however, are distinguishable. In that case there was no evidence that the *corpus delicti* had been sent to hospital. In this case there is the evidence of the Penghulu that he accompanied the body of Omar and the wounded survivor, Rifin, to the hospital at the same time and there were a number of other circumstances which exclude any real risk that the body examined was not that of Omar.

Nevertheless, it is a matter for adverse comment that all the routine modes of identification were omitted.

It is not right that the Court should have to comb the evidence or draw debateable inferences on such a point. It should have appeared on the face of the deposition, in case the medical man was not available at the trial. If it was overlooked then, it certainly should have been made good at the trial. Any text book on medical jurisprudence begins the chapter on examination of the person, living or dead, with the question of identification. It ought to be brought home to Medical Officers and, more especially, to Deputy Public Prosecutors that if they omit such an elementary precaution they may raise either a question as to their professional competence or an inference of irresponsible negligence.

The appeal is dismissed but the minor conviction will be formally amended to one for voluntarily causing grievous hurt by shooting and the sentence therefore reduced to three years.

Appeal dismissed. Sentence reduced.

LIM KWEE GEOK v. R.

[A. Cr. J. (Spenser Wilkinson, J.) December 15, 1952]

[Penang — Criminal Appeal No. 49 of 1952]

Penal Code, s. 411 — Evidence — Evidence of accomplice — Corroboration — Degree of corroboration required.

The accused was charged with dishonestly receiving stolen property, to wit, 30 cases of milk, which were found in the possession of a proprietor of a shop. The proprietor stated that he had bought the milk from the accused at a price below the usual price and that he gave the accused a cheque in settlement which also included a sum stated by the accused. At the trial, the proprietor produced his account books after being asked in cross-examination and the books showed that the entries relating to the milk were extremely suspicious. The accused completely denied that he sold the milk.

The question was whether the proprietor was an accomplice and whether there was sufficient corroborative evidence.

Held: (1) the proprietor was not only an accomplice but an accomplice of a type upon whose evidence as a witness it is most unsafe to convict without strong independent corroboration; (2) it is imperative in a case of this kind for a Magistrate to find which of the witnesses are accomplices (if there is any doubt about it) and whether there is any, and if so, what kind of corroboration of their evidence.

Case referred to:—

(1) *Chop Yong Siang v. Lim Yam Hong* 14 S.S.L.R. 152

CRIMINAL APPEAL.

R. D. Hume for the appellant.

C. M. Sheridan (D.P.P.) for the respondent.

Spenser Wilkinson, J.: — The Manager of Nestle's Products, Penang received information that tins of Milkmaid Sweetened Condensed Milk ex s.s. "Socotra" which had arrived in Penang on the 10th August, 1952 were being sold in Penang and made a report about this to the police. On the same day Mr. Wright, the O.C.P.D. Port, Penang went to the accused's shop in Perak Road and searched his shop. Nothing incriminating was found there. He then went to the shop of Lu Iu Chun, proprietor of Chop Eng Hong at 109, Cintra Street, Penang and there found some 28 cases of Nestle's milk, which Mr. Brittain was able to identify by certain marks as being part of the consignment of milk shipped in the "Socotra". It is not disputed that there was ample evidence that these cases of milk had in fact been stolen.

Lu Iu Chun being thus found in possession of these stolen goods explained that he had bought 30 cases of milk from the accused who had brought them to his shop in a lorry at 8 a.m. on the 11th August, 1952. According to Lu Iu Chun the milk was offered to him at $29 per case, this being $2.50 per case below the usual price and he gave the accused a cheque for $1,300, which was a sum $430 above the total price of the milk, the $430 being a loan to the accused which was repaid on the 13th August, 1952.

The accused was thereupon charged with dishonestly receiving stolen property in Penang Harbour under section 411 of the Penal Code and the explanation of Lu Iu Chun outlined above was the gist of the evidence he gave in Court at the trial as 4th Prosecution Witness. In support of his evidence Lu Iu Chun produced the cheque for $1,300, the counterfoil and a document purporting to be signed by the accused which reads as follows:—

"I hereby promise to sell Eng Hong 30 cases of 'Milkmaid Brand' tinned milk for $870. Received in advance one Ban Hin Lee's cheque No. 172577 for $1,300.

After deducting the cost for the milk, a balance of $430 is still with me.

(Signed) Lim Koo Geok
11.8.52."

Lu Iu Chun did not produce his books as part of his evidence in chief but when cross-examined thereon stated that he could produce his books and subsequently did so. The learned Magistrate makes the following remarks regarding these books in his judgment:—

"In all three of these books, the entry covering the milk transaction is extremely suspicious. In the ledger, at page 10, under the date 12.8.52, the original figure of $104.23 has been altered to $974.23 — a difference of $870.00 which was the price of the milk. In the Day Book, at pages 58, 59, an entry for 'Milk — $870.00' occurs over an erasured 㓁 仃 in the last column of page 58. The two characters erased are used throughout this book in the last column of a page whenever the clerk, for one reason or another, does not wish to make an entry in this column. Further, in the first column of page 59, the total for the day — $982.33 — is made to conform with the additional $870.00 and is written over an earlier total no longer legible. And, finally, the total